



POLICE DEPARTMENT

March 3, 2015

MEMORANDUM FOR: Police Commissioner

Re: Police Officer Joel Gomez
Tax Registry No. 943307
41 Precinct
Disciplinary Case No. 2013-9838

Police Officer Thomas Diggs
Tax Registry No. 936494
41 Precinct
Disciplinary Case No. 2013-9839

The above-named members of the Department appeared before the Court on October 14, 2014, charged with the following:

Disciplinary Case No. 2013-9838

1. Said Police Officer Joel Gomez, on or about August 16, 2012, at approximately 1330 hours, while assigned to the 41st Precinct and on duty, in the vicinity of [REDACTED], abused his authority as a member of the New York City Police Department in that he stopped Robert Annunziata without sufficient legal authority.

P.G. 212-11, Page 1, Paragraph 1 – STOP AND FRISK

Disciplinary Case No. 2013-9839

1. Said Police Officer Thomas Diggs, on or about August 16, 2012, at approximately 1330 hours, while assigned to the 41st Precinct and on duty, in the vicinity of [REDACTED], abused his authority as a member of the New York City Police Department in that he searched Robert Annunziata without sufficient legal authority.

P.G. 212-11, Page 1, Paragraph 3 – STOP AND FRISK

The case was presented by Remi Groner, Esq., Civilian Complaint Review Board.
Respondents were represented by John P. Tynan, Esq., Worth, Longworth & London, LLP.

Respondents pleaded Not Guilty to the subject charges. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review.

RECOMMENDATION

Respondent Gomez is found Not Guilty. Respondent Diggs is found Guilty.

FINDINGS AND ANALYSIS

Introduction

The complainant in this case, Pasquale Robert Annunziata, was an electrical worker for Con Edison and [REDACTED]. On the hot summer midday in question he was working in the Hunts Point section of the Bronx. Around 1330 hours, Annunziata testified, he took a break "to stretch [his] legs out" and got out of his truck, which was parked on Barry Street. He removed his uniform shirt, leaving only a T-shirt. His pants were dirty. He walked around the corner to [REDACTED] (see CCRB Exhibit 1, map).

Respondents were assigned to the 41 Precinct Street Narcotics Enforcement Team and were on plainclothes unmarked vehicular patrol in the area. Respondent Gomez was the operator and Respondent Diggs the recorder. It was undisputed, indeed acknowledged by all, that the location of [REDACTED] had a high incidence of prostitution. Annunziata observed several women across the street whose dress was consistent with that of street prostitutes. He

maintained that he stayed on the sidewalk, on the monastery side (approximately cardinal north) of [REDACTED].

Respondents testified that they observed something different. They saw Annunziata following a woman that they knew based on prior contacts to be a sex worker. It appeared that she was trying to get away from him by crossing the street, but he would follow her and she would have to cross again in a zigzagging manner. According to Respondent Diggs, she looked nervous. Respondents testified that they believed Annunziata might have been trying to rob the woman. They did not believe he was attempting to patronize a prostitute because it did not appear to be a business transaction. The interaction took about a minute, according to Respondent Gomez. Respondent Gomez stopped the vehicle and approached Annunziata. Respondent Diggs approached the woman.

Annunziata testified that Respondent Gomez "got in front" of him and "yelled at me what's up." About 30 to 60 seconds later, Respondent Gomez grabbed Annunziata's right wrist as they were speaking, once Annunziata offered to reach for his wallet. Annunziata pulled away slightly but did "[n]ot really" pull his arm away. Annunziata claimed that Respondent Diggs punched him in the left side of the face, leading him to fall to the ground. He hurt his left arm and shoulder, as well as his neck and back. The incident allegedly led to sustained headaches as well (see CCRB Exhibits 2 & 3, photographs and medical records).

Annunziata said that the officers threw him against the wall and handcuffed him. Annunziata asserted that Respondent Diggs searched his pockets, but indicated that when the officers found his Con Ed ID, they let him go. Annunziata did not see the officers write down his pedigree information or get on the radio to check for warrants.

Respondent Gomez testified that he approached Annunziata and asked what he was doing in the area. Respondent Gomez placed his hands, palms out in front of his body, to impede Annunziata's progress. The officer saw a bulge on his waistband and frisked it, but saw that it was only a cell phone. Annunziata fell while walking backward. He got up on his own and left. According to Respondents, Respondent Diggs only spoke to the woman and did not interact with Annunziata at all.

Annunziata gave a description of Respondent Gomez to the CCRB as a short Hispanic male, about 5'8", "kind of chubby," with a black shirt and black shorts. Respondent Diggs he described as a tall black male with dreadlocks, a white shirt and black pants. It was confirmed at trial that Respondent Gomez was Hispanic, 5'8" to 5'9", and Respondent Diggs was black and about 6'3".

Respondents filled out a Stop, Question and Frisk Report Worksheet (UF-250) for the encounter but left the name of the stopped individual blank.

Annunziata has filed a lawsuit against the city with regard to this incident.

Respondent Gomez

Respondents' account of viewing something between Annunziata and the woman requiring police action was credible. Annunziata agreed that he first was approached only by Respondent Gomez. Respondent Diggs came over later. This suggests that Respondent Diggs was dealing with the woman and that they were taking valid police action.

The question in this case, however, is whether the stop conducted by Respondent Gomez was justified. Annunziata testified that Respondent Gomez "got in front" of him and "yelled at me what's up." Respondent Gomez agreed that he put his hands up to stop Annunziata's

progress. According to the CCRB's opening statement, this was the "stop" referred to in the specification.

Respondents' observation of an individual following a woman known to work as a prostitute, with her trying to get away from him rather than treating him as a potential customer, gave rise to a founded suspicion that criminality was afoot. This allowed Respondent Gomez the common-law right of inquiry under Step II of the street encounters analysis set forth in People v. De Bour, 40 N.Y.2d 210 (1976). See People v. McEachin, 148 A.D.2d 551, 551-52 (2d Dept. 1989) (defendant observed following another pedestrian on deserted street near midnight, entering lobby of apartment building when he saw he was being observed, only to exit moments later).

An officer making a common-law inquiry may detain a suspect temporarily to the extent necessary to obtain explanatory information. See People v. Lee, 96 A.D.3d 1522, 1525 (4th Dept. 2012); cf. People v. Miller, 149 A.D.2d 538, 540 (2d Dept. 1989) (temporary detention while officers awaited results of stolen-vehicle and warrant checks did not constitute forcible stop). Respondent Gomez's arms gesture did not rise to the level of a forcible stop as it did not prevent Annunziata from proceeding. It was a gesture that the officer wanted to speak to him but not a significant interruption of his liberty of movement. See People v. Cantor, 36 N.Y.2d 106, 111 (1975).

Key to this determination is that by Annunziata's own statement, it was only about 30 to 60 seconds later that Respondent Gomez grabbed his wrist as they already were speaking. Cf. People v. Vaughan, 187 A.D.2d 685, 686 (2d Dept. 1992) (grabbing defendant's arm and frisking constituted seizure); People v. Howard, 147 A.D.2d 177, 180 (1st Dept. 1989) (seizure occurred when officers gave authoritative directive to halt, defendant immediately complied, and

with no preliminary inquiry, officers took defendant's arm and frisked him). This occurred well after the "stop" referred to in the specification as explained by the prosecutor: the initial approach of Annunziata by Respondent Gomez.

Accordingly, Respondent Gomez is found Not Guilty.

Respondent Diggs

Respondent Diggs is charged with unlawfully searching Annunziata. Annunziata asserted that Respondent Diggs searched his pockets after he was handcuffed and placed against the wall. Respondents contended not only that this did not happen but that Respondent Diggs did not interact with Annunziata at all. Thus the Court must make a credibility determination.

Annunziata and Respondents both gave facially credible accounts and favorable testimonial demeanors. Certain things about the testimony stood out, however. Annunziata gave a strikingly accurate description of Respondent Diggs. The height and general size all matched. According to Respondents' testimony, this should have been unlikely because Annunziata never interacted with Respondent Diggs. Instead, it demonstrated Annunziata's credibility on this point.

Further, the photographic evidence demonstrated that Annunziata received several injuries during the encounter, as he testified. Respondents' testimony was not consistent with these injuries.

Respondents filled out a UF-250 for the encounter and left the name of the stopped person blank. This was consistent with their testimony that Respondent Gomez's interaction with the complainant was so brief as not to allow for identification to be checked. It also was

consistent, however, with Annunziata's testimony that once Respondents found his Con Ed ID, they returned it to him quickly and sent him on his way.

In sum, therefore, the Court credits Annunziata's claim that Respondent Diggs searched him. The next question is whether that search was lawful. A search requires probable cause. See People v. Howard, 50 N.Y.2d 583, 586 (1980); *Case Nos. 2013-9655 & -9656*, p. 18 (Dec. 19, 2014). Probable cause is defined as information sufficient to support a reasonable belief by someone with the officer's expertise, under the circumstances, that a crime has been or is being committed. See People v. Shulman, 6 N.Y.3d 1, 25 (2005); People v. McRay, 51 N.Y.2d 594, 602 (1980). Although Respondents had sufficient information to inquire of Annunziata as to what was going on, there was insufficient information for them to conclude at that point that he was committing a crime. Therefore Respondent Diggs is found Guilty.

Penalty

In order to determine an appropriate penalty, Respondent Diggs's service record was examined. See Matter of Pell v. Board of Educ., 34 N.Y.2d 222, 240 (1974). He was appointed to the Department on January 10, 2005. Information from his personnel folder that was considered in making this penalty recommendation is contained in an attached confidential memorandum.

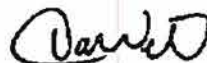
Although Respondent Diggs's search of Annunziata generally was within the course of proper police action to interdict a possible offense, the search itself plainly was unlawful. In light of Respondent Diggs's excellent evaluations and medal history, see Confidential Mem., *infra*, the CCRB's penalty recommendation of 10 vacation days is too high. Therefore, the tribunal recommends that Respondent Diggs forfeit 4 vacation days as a penalty. See Case No.

POLICE OFFICER JOEL GOMEZ
POLICE OFFICER THOMAS DIGGS

8

2013-10189, Police Comm'r's Mem., p. 2 (Jan. 13, 2015) (reducing penalty from 8 to 4 days for officer that unlawfully searched individual and vehicle, but that had 4.5 evaluations, 36 medals and many favorable comments by commanding officer).

Respectfully submitted,



David S. Weisel
Assistant Deputy Commissioner – Trials

APPROVED

JAN 22 2015

WILLIAM J. BRATTON
POLICE COMMISSIONER

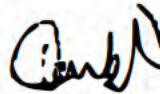
**POLICE DEPARTMENT
CITY OF NEW YORK**

From: Assistant Deputy Commissioner – Trials
To: Police Commissioner
Subject: CONFIDENTIAL MEMORANDUM
POLICE OFFICER THOMAS DIGGS
TAX REGISTRY NO. 936494
DISCIPLINARY CASE NO. 2013-9839

In 2014, Respondent Diggs received an overall rating of 5.0 "Extremely Competent" on his annual performance evaluation. He was rated 4.5 in 2012 and 2013. He has been awarded five medals for Excellent Police Duty and one for Meritorious Police Duty. [REDACTED] He was carried as Chronic Sick Category A in 2010 and 2011.

Respondent Diggs has been the subject of one prior adjudication. In 2006, he forfeited 13 vacation days after pleading guilty to neglecting to voucher found property.

For your consideration.



David S. Weisel
Assistant Deputy Commissioner – Trials